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January 4, 1999

VIA FEDERAL EXPRESS

Magalie R. Salas, Secretary
Federal Communications Commission
1919 M Street NW, Room 222
Washington, D.C. 20554

RE: In the Matter of GTE Telephone Operating Companies GTOC Tariff FCC No. 1
GTOC Transmittal No. 1148
CC Docket No. 98-79

Dear Ms. Salas:

Enclosed for filing are an original and four copies of the Comments of Washington Utilities and Transportation Commission in Support of Petitions to Reconsider and Clarify. Per instructions, one copy has been sent to the Competitive Pricing Division and one copy to the International Transcription Service.

Sincerely,

JEFFREY D. GOLTZ
Sr. Assistant Attorney General

JDG:kll
Enclosures
cc: Service List

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 98-79
GTE Telephone Operating Companies	)	
GTOC Tariff FCC No. 1	)	COMMENTS OF WASHINGTON
GTOC Transmittal No. 1148	)	UTILITIES AND TRANSPORTATION
	)	COMMISSION IN SUPPORT OF
	)	PETITIONS TO RECONSIDER AND
	)	CLARIFY

I.

INTRODUCTION

Pursuant to the Notice dated December 4, 1998, the Washington Utilities and Transportation Commission (WUTC) files these comments in support of the Petition of the National Association of Regulatory Utility Commissioners (NARUC) to "clarify" or reconsider the Commission's October 30, 1998, Memorandum Opinion and Order in this matter (GTE DSL Order) and the Petition for reconsideration filed by MCI/WorldCom. The WUTC earlier filed its Opposition of Washington Utilities and Transportation Commission to Direct Case of GTE (WUTC Opposition).

We make the following points. First, we argue that Commission's GTE DSL Order erred in applying the "one-call" theory to DSL access to the Internet through an Internet service

provider (ISP) in that (1) the nature of the DSL access to ISPs distinguishes the communication here at issue from the communication at issue in past "one-call" cases; and (2) the logical consequence of application of that theory is inconsistent with prior Commission treatment of ISPs. Second, as we argued earlier, WUTC Opposition at 5-6, and contrary to the assertions of GTE, Rebuttal of GTE at 11, policy considerations, including expectations of consumers, are relevant in sorting out the jurisdictional issues. Finally, we argue that, in any event, the Commission should clarify that its GTE DSL Order does not preclude state commissions from determining that GTE or other local exchange companies must file tariffs for DSL services with those state commissions.

II.

ARGUMENT

A. Applying the One-Call Theory to Internet Access Is Inconsistent with Past "One-Call" Cases and Prior Commission Treatment of ISPs.

The Commission adopted the "one-call" theory proposed by GTE. Essentially, GTE proposed, and the Commission accepted, the theory that the two "ends" of a communication initiated by an end-user of DSL service are the initiating end and the location of whatever Internet site that end-user visits. We had argued that the "end" of the communication is the ISP (in almost all cases located in the same locality as the end-user). At that point, the telecommunications end; what the ISP then provides is an information service. WUTC Opposition at 3-5. Essentially, we concur with MCI on this point. MCI Petition at 3-5.[1]

[1]We also agree that there is ample evidence before the Commission from which it should conclude that even if the GTE DSL service is properly tariffed at the federal level, there are intrastate uses as well, which would justify tariffing the service at the state level. MCI Petition at

We have no quarrel in general with the "one-call" basis for determining whether a given telecommunication is interstate. That one-call theory goes back at least to 1936. Capital City Telephone Co., 3 F.C.C. 189 (1936). There, the Commission held that the phone link from a microphone to a radio station (and then over the air waves) was all part of one interstate communication. The Commission noted that the Communications Act gave the FCC jurisdiction over such wire links to the radio transmitter. Id. at 194. Cases subsequent to that relied on the "uninterrupted" communication from between the two end-points of the communication[2] and on the definition of "wire communications" in the Communications Act.[3]

However, there are at least two factors which distinguish the application of the one-call theory to the GTE DSL service from these earlier applications of that theory. First, we are operating under a significantly revised Communications Act. The new definition of "telecommunications" is more precise on when telecommunications ends. The Act defines "telecommunications as

> the transmission, between or among points specified by the use, of information of the user's choosing, without change in the form or content of the information as sent or received.

47 U.S.C. §153(43). In other words, telecommunications ends where there is a change in form or content of the information.

8, n.24.

[2]E.g., Idaho Microwave, Inc. v. Federal Communications Comm'n, 352 F.2d 729, 732 (D.C. Cir. 1965).

[3]E.g., National Ass'n of Regulatory Utility Comm'rs v. Federal Communications Comm'n, 746 F.2d 1492, 1499 (D.C. Cir. 1984); United States v. American Telephone & Telegraph Co., 57 F.Supp. 451, 455 (S.D.N.Y. 1944).

As we argued earlier, WUTC Opposition at 4-5, the communication from the end user of the DSL service is changed, at least in form, if not in content, when it passes through the ISP. WUTC Opposition at 5, n.4; see Southwestern Bell Telephone Co. v. Texas Public Utility Comm'n, No. 98 CA-043, slip op. at 20, 1998 LEXIS 12938 (W.D. Texas, June 10, 1998), citing Report to Congress: In Re Federal-State Joint Board on Universal Service, FCC 96-45, ¶64 (April 10, 1998).[4] While that may have been irrelevant to pre-1996 one-call cases, as they were not based on this statutory language, it is relevant now.[5]

Second, even without a change in form or content of the information sent by the end-user, there is an interruption in the flow of the communication which distinguishes the one-call cases. Generally, in the typical one-call case, there was an uninterrupted, continuous communication from the caller to a selected end point. See GTE DSL Order ¶¶17-18. In the case of Internet access, there are two distinct communications, separated in time. First, there is the access to the ISP. Second, there is the actual use of the Internet enhanced information service. The fact that the latter involves interstate telecommunications does not mean that the former is inherently part of an uninterrupted communication from the end-user to the ultimate web-site destination. In

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[4]The Commission's definition of enhanced services reinforces our assertion that the ISP changes the form of the transmitted information. 47 C.F.R. §64.702 ("enhanced service refers to services . . . which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information").

[5]This is analogous to the federal-state jurisdictional distinction in the pre-Natural Gas Act period. There, even with continuous flow of gas from out-of-state to an in-state customer, the interstate jurisdiction ceased where the form of the gas changed. See East Ohio Gas Co. v. Tax Comm'n of Ohio, 283 U.S. 465, 471 (1931) ("The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail.").

other words, the "continuity" in communications which characterizes the one-call cases is not present in the case of access to and use of ISP services.

We also agree with MCI that determining that the DSL service is part of one larger communication could place the ISP in the role of a provider of telecommunications services. If they are changing the form or content of the information sent by the end user (as we contend they are), then the ISPs are not providing telecommunications services. However, if they are not changing the form or content of the information, then the terms of the 1996 Act, 47 U.S.C. §153(43)-(44), (46), indicate that they are providing such services. To avoid inconsistency with past Commission decisions, the Commission should grant the motion to reconsider filed by MCI.

B. Policy Considerations, Including Expectations of Consumers Are Relevant in Making the Jurisdictional Determination.

In our Opposition, we argued that there were policy reasons for leaving jurisdiction with the state commissions. Not only would consumers of the service look to state commissions for relief should there be service quality concerns, but state concerns about potential anti-competitive practices warrant tariffing at the state level. WUTC Opposition at 5-7. GTE responded in a short argument headed "Policy Concerns Cannot Alter Jurisdiction." GTE Rebuttal at 11.

That statement of GTE is inconsistent with past jurisdictional decisions of courts and this Commission. Indeed, policy concerns have been, and should be, at the forefront of drawing the line between federal and state jurisdictions.

Congress, when acting to preempt the exercise of state authority, considers just such factors. See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 208-09 (1993). Courts when attempting to ascertain Congressional

allocations of federal-state jurisdiction likewise consider the policy choices before Congress. E.g., Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251, 253-54 (1984).[6]

Likewise, when this Commission acts pursuant to delegated authority, it either seeks to determine what jurisdictional line Congress has drawn or, pursuant to Congressional delegation, acts to draw that line. In the former, the Commission, like a court, must analyze the policies Congress attempted to effect in making the jurisdictional decision. In the latter, the Commission, like Congress, must weigh policies in determining whether to preempt state authority. It has done so in the past,[7] and it should do so in this case.

C. In Any Event, the Commission Should Clarify that Its Decision Does Not Prevent States from Requiring that GTE's DSL Service Also Be Tariffed at the State Level.

For the reasons stated in the NARUC and MCI Petitions, we urge the Commission to clarify that even if the GTE DSL service properly is tariffed at the Commission, the Commission should clarify its order to state that state commissions also may have jurisdiction to require such tariffs be filed at the state level as well. The WUTC currently is conducting a proceeding in which the issue is whether GTE's DSL service must be so filed with the WUTC. Washington

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[6]See also Pennsylvania Gas Co. v. Public Service Comm'n of New York, 252 U.S. 23, 30 (1920) (referring to our federal system as a "practical adjustment").

[7]This Commission has so taken policy into account when making its various "one-call" decisions. E.g., Long Distance/USA v. Bell Telephone Co. of Pennsylvania, 10 FCC Rcd 1634, 1638 (1995) ("[F]rom the caller's point of view, any intermediate switching during the call is transparent."); Bell South Memory Call, 7 FCC Rcd 1619, 1622 (1992) (evaluating practical implications of adopting the two-call theory); see General Telephone Co. v. Federal Communications Comm'n, 413 F.2d 390, 401 (D.C. Cir. 1969) (basing determination in part on "fragmenting of regulation" if opposite conclusion were to be reached). Here, there are sound policy reasons for "fragmenting" regulation at least to the extent that state commissions can have authority over related service and competitive issues. To centralize jurisdiction over these matters solely with the FCC could weaken overall public interest oversight.

Utilities & Transportation Comm'n v. GTE Northwest, Inc., No. UT-980763 (WUTC, filed Aug. 21, 1998). Because the Commission did not rule that intrastate tariffing of GTE's DSL service is preempted by the inseverability doctrine or any other doctrine, GTE DSL Order ¶28, we do not read the Commission's Order to prohibit dual tariffing.

III.

CONCLUSION

The Commission should refrain from allowing this proceeding to be the vehicle for major policy reform. Such policy considerations are more appropriate to a rule making proceeding. Therefore, we urge the Commission to grant the NARUC and MCI Petitions.

Dated, this 4th day of January, 1999.

Respectfully submitted,

CHRISTINE O. GREGOIRE
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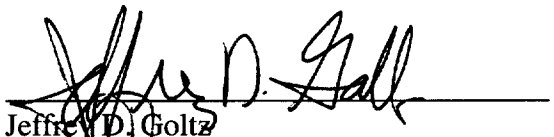

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CERTIFICATE OF SERVICE

I certify this day that I served a copy of the foregoing COMMENTS OF WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION IN SUPPORT OF PETITIONS TO RECONSIDER AND CLARIFY upon the parties listed below via U.S. mail, postage prepaid:

DATED this 4th day of January, 1999.

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